No. 75-1105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

McCANN L. REID, *Petitioner*,

v.

MEMPHIS PUBLISHING COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, McCann L. Reid, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 521 F.2d 512 (6th Cir. 1975), and is reprinted in Appendix A. The opinion of the District Court for the Western District of Tennessee, Western Division, is reported at 369 F. Supp. 684 (D. Tenn. 1973), and is reprinted in Appendix B. The opinion of the Court of Appeals in the first appeal in this case is reported at 468 F.2d 346 (6th Cir. 1972), and is reprinted in

Appendix C. The unreported opinion of the District Court, issued prior to the first appeal in this case, is reprinted in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1975. A timely petition for rehearing was denied by order entered November 5, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964, as implemented by Guidelines promulgated by the Equal Employment Opportunity Commission, requires employers to make reasonable efforts to accommodate their work schedules and practices to the religious observances of their employees, unless it is shown that such an accommodation would impose an undue hardship on the conduct of the employer's business.

2. Whether the mere possibility that resentment might be created among other employees justifies an employer's refusal to make any effort to accommodate its work schedules to the religious observances of an employee.

3. Whether the majority of the Court of Appeals, on the basis of a *de novo* review of the evidence, properly rejected the trial court's finding that an accommodation of respondent's work schedules to petitioner's religious observances would not impose an undue hardship on the conduct of respondent's business.

4. Whether the standard adopted by the courts below for the award of attorney's fees in Title VII cases, under which such awards are rigidly denied to all plaintiffs who do not represent a class and are not granted injunctive relief, is consistent with this Court's contrary interpretation of other identical provisions of the 1964 Civil Rights Act and with Congress' goal of encouraging judicial actions by victims of religious and racial discrimination.

STATUTES INVOLVED

Section 701(j) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e(j), provides:

> "The term 'religion' includes all aspects of religious observances and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in part:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *"

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow

the prevailing party . . . a reasonable attorney's fee as part of the costs."

The Guidelines on Discrimination Because of Religion issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1605.1, 32 Fed. Reg. 10298 (1967), provide in part:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religous needs of the employee unreasonable."

STATEMENT OF THE CASE

Petitioner is a Seventh-Day Adventist. He applied in September, 1967, for a position as a copy reader with the Memphis Press-Scimitar, one of two newspapers published in Memphis by respondent. Copy readers select and edit stories received from the wire services and local sources, and write headlines. The evidence presented to the trial court "clearly establishe[d]" that petitioner had the skill and experience to serve successfully as a copy reader. (App. 43a.)

At the time of his application to respondent, petitioner was employed as the editor of a weekly newspaper. He holds a Bachelor of Science degree in journalism.

The position for which petitioner applied required only five days of work each week. Although the Press-Scimitar was published on six days of each week, it maintained a reduced staff and observed shorter working hours on Saturdays. Petitioner made known to respondent that he adhered to the tenet of his religion that forbids Saturday work. Nonetheless, he was offered a position only on the condition that he work on Saturdays. Confronted with a demand that he abandon his sincere religious conviction that he should refrain from Saturday work, petitioner declined the offer. (App. 40a.)

The Press-Scimitar employed ten copy readers. At least seven copy readers were required to work each weekday, when the newspaper published three editions, and five were required to work each Saturday, when two editions were published. The daily shift for a copy reader was eight hours, but on weekdays some shifts began as early as 5 a.m. and others ended as late as 2:30 p.m. On Saturdays the shift was from 5:00 a.m. to 1:30 p.m. All copy readers who were then-employed worked at least occasionally on Saturdays, but some of the readers worked only infrequently on that day. (App. 44a.)

A few of the copy readers employed by the Press-Scimitar required special skills. They included the slot man, who assigned incoming stories, the telegraph man, and the copy reader who handled mid-south news. The other copy readers handled routine work and did not require special skills, although they might

develop individual specialties, such as society news or sports. Flexibility in scheduling was achieved through overtime and the use of reporters as copy readers. (App. 43a.) Although petitioner, if hired, would have replaced a copy reader who customarily worked on Saturdays, petitioner was offered a position because of his general ability, and not because he possessed any special skills which the newspaper needed on any particular day of the week. The news editor expected that he could determine the tasks for which petitioner was best suited only after several weeks of work. (App. 43a.)

Respondent asserted that a problem of employee morale might result if petitioner were never assigned Saturday work, while the other nine copy readers were required, from time to time, to work on Saturdays.[1] Other testimony presented to the trial court indicated, however, that even if such resentment might arise, it could be readily overcome by petitioner. (App. 44a.) In any event, respondent did not offer petitioner a trial period of employment in order to determine whether its other employees were in fact unable to respect and accept petitioner's religious observances, or whether petitioner would demonstrate skills that could best be utilized by the newspaper on weekdays. Nor did respondent suggest any work schedule for respondent, such as the least desirable shift each weekday, as an alternative to Saturday work. To the contrary, respondent made no effort whatever to accommodate its work schedules and prac-

[1] In contrast, however, respondent's other Memphis newspaper employed two Seventh-Day Adventists at the time of petitioner's application, and those employees were not required to work on Saturdays. (App. 40a.)

tices to petitioner's religious observances. (App. 45a.)

PROCEEDINGS BELOW

Petitioner filed a timely complaint with the District Court for the Western District of Tennessee, Western Division, on December 2, 1968, alleging unlawful discrimination in employment on the basis of religion and race.[2] The trial court, relying on *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), found adversely to petitioner. It concluded that employers have no duty of any kind to accommodate their business practices to the religious observances of employees and applicants for employment. (App. 68a.)

On appeal, the Sixth Circuit reversed the judgment of the District Court. The Court of Appeals in *Reid I* concluded that this case is controlled by the Guidelines on Discrimination Because of Religion issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1605.1 (1967), as well as the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). (App. 56a.) It emphasized that the 1972 amendments to Title VII had specifically provided that the standards embodied in the Commission's Guidelines should govern employers' obligations to accommodate their business practices to their employees' religious observances. (App. 58a.) The Court of Appeals concluded that the EEOC Guidelines were "effective and valid" at the time of petitioner's application for employment. (App. 57a.) It remanded the case to the trial court to determine whether re-

[2] Petitioner's allegation of racial discrimination is no longer an issue in this case.

spondent could make a "reasonable accommodation" to petitioner's religious observances "without undue hardship." (App. 58a.)

On remand, the trial court conducted an evidentiary hearing. On the basis of the hearing, as well as the evidence previously presented to it, it found that respondent had not shown that the accommodation of its work schedules to petitioner's religious observances would impose an undue hardship on respondent's business operations. (App. 46a.) It emphasized that:

> "In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation unreasonable, particularly in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff." (App. 46a.)

The trial court awarded petitioner back-pay of $7,349.00. It denied petitioner an award of attorney's fees on the grounds that he did not file a class action or obtain injunctive relief. (App. 49a.)

Petitioner appealed from the denial of attorney's fees, and respondent cross-appealed on the merits of the case. On the second appeal, the Sixth Circuit, with Judge Edwards dissenting, overturned the trial

court's finding of discrimination and affirmed the denial of attorney's fees. Despite the principles stated by the Court of Appeals in *Reid I,* the majority in *Reid II* suggested that the EEOC's Guidelines with respect to religious discrimination were, at least prior to the effective date of 1972 amendments to Title VII, beyond the Commission's authority. The majority stated that the District Court's finding that an accommodation with petitioner's religious observances would not result in undue hardship was not supported by substantial evidence and was clearly erroneous. (App. 11a.)

In dissent, Judge Edwards emphasized that the trial court had found that respondent made *"no effort whatsoever"* to accommodate petitioner's religious observances. (App. 22a) (emphasis in original). He found it "astonishing" that the majority had set aside the trial court's "carefully considered judgment" merely by "accepting the defendant's contentions as to the facts." (App. 24a.) The majority had "retrie[d]" the case on the written record, despite the trial judge's "great advantage" in assessing the credibility of the testimony. (App. 24a.) He emphasized that the majority had shifted to the employee the burden of proof regarding undue hardship and accommodation, contrary to the express provisions of the EEOC's Guidelines. (App. 24a.) He pointed out that the trial court had found that the accommodation of respondent's work practices to petitioner's religious observances would not have occasioned "any added expense of any kind" to respondent. (App. 35a.) He concluded that the judgment of the District Court with respect to damages should be affirmed and that the judgment with respect to attorneys' fees should be remanded for further consideration. (App. 36a.)

Judge Edwards also dissented from the denial of rehearing *en banc*. He emphasized that reconsideration of the majority opinion is "essential" to establish a "consistent rule of law" in this area.

REASONS FOR GRANTING THE WRIT

This case involves issues of national significance regarding the scope and protection of rights created for religious minorities by Title VII of the 1964 Civil Rights Act. It presents the important issue of the extent of employers' obligations to accommodate their business practices to the differing religious observances and beliefs of their employees. This issue has been considered by this Court on only one previous occasion, and was not resolved.[3]

The majority opinion of the Court of Appeals challenges the statutory authority of the Equal Employment Opportunity Commission to require employers, short of undue hardship, to accommodate their work schedules and practices to the religious observances of their employees. It relieves employers of their obligation under the EEOC Guidelines to establish that such an accommodation would result in undue hardship, and shifts the burden of proof to the employee. In each of these respects, the opinion below is in direct conflict with the decisions of other courts, including the Courts of Appeals for the Fifth, Eighth and Ninth Circuits, in which the Commission's authority was sustained and its Guidelines were applied.

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[3] Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), *aff'g by an equally divided Court*, 429 F.2d 324 (6th Cir. 1970).

The majority of the Court of Appeals refused to afford religious minorities the protection that has been guaranteed racial minorities by this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), under which the burden is placed upon employers to demonstrate that an employment practice that adversely affects a minority is necessary to the employer's business operations. The opinion below creates serious uncertainty and confusion regarding the obligations of employers to adjust their business practices to the religious observances of their employees. Unless this case is reviewed by this Court, the national commitment embodied in Title VII to eradicate discrimination in employment opportunities will be impeded and frustrated. The exercise of First Amendment rights by petitioner and numerous others will be discouraged and penalized.

This case also presents to the Court its first opportunity to establish guidelines for the exercise of authority afforded district courts under Title VII to award attorneys' fees. This Court emphasized in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), that the remedial provisions of Title VII must be implemented in a manner that will promote the important national policies reflected in Title VII. Despite those instructions, the courts below established a rigid and grudging standard for the award of attorneys' fees that is directly inconsistent with the standards already adopted by this Court in connection with the identical provisions of Title II of the 1964 Act. If such a hostile standard for the award of attorneys' fees in Title VII cases is left uncorrected, it will seriously discourage many victims of religious and racial discrimination from seeking judicial relief.

Numerous Title VII cases are now pending in which the propriety of an award of attorneys' fees is at issue. The establishment of proper standards in this case by this Court will eliminate the uncertainty created by the courts below, and assure the prompt and just resolution of the attorneys' fee issue in other Title VII cases.

I.

The Court of Appeals Failed to Require Respondent to Make Any Effort Whatever to Accommodate Its Business Practices to Petitioner's Religious Observances.

Despite the instructions given to the District Court in *Reid I* to apply the EEOC's Guidelines, the majority in *Reid II* held that it was error for the District Court to require respondent, in a case in which undue hardship was not shown to exist, to accommodate its business practices to petitioner's religious observances. The decision is both inconsistent with Congress' intentions and directly in conflict with the decisions of other courts which have recently considered the obligations of employers to religious and racial minorities.[4]

The majority opinion below disregarded well-settled rules for the application of the EEOC's Guidelines. Numerous other courts, including the Courts of Appeals for the Fifth, Eighth and Ninth Circuits, have repeatedly utilized the EEOC Guidelines to define

[4] Indeed, *Reid II* also appears to be in conflict with other decisions of the Sixth Circuit. *E.g.*, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975); Draper v. U.S. Pipe & Foundry Co., 11 FEP 1107 (6th Cir. 1975). *But see* Dewey v. Reynolds Metals Co., 429 F.2d 324 n. 1 (6th Cir. 1970), *affirmed by an equally divided Court*, 402 U.S. 689 (1971).

employers' obligations to accommodate their employees' religious observances. *Yott* v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Riley* v. *Bendix*, 464 F.2d 1113 (5th Cir. 1972); *Hardison* v. *Trans World Airlines, Inc.* F.2d (8th Cir. 1975); *Ward* v. *Allegheny Ludlum Steel Co.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Weitkenaut* v. *Goodyear Tire & Rubber*, 381 F.Supp. 1284 (D. Vt. 1974). The Eighth Circuit stated unequivocally in *Hardison*, *supra* at n.5, that it rejected *Reid II* and accepted Judge Edwards' dissenting opinion. Similarly, this Court has emphasized that such guidelines are entitled to "great deference," *Griggs* v. *Duke Power Co.*, *supra* at 433-34; *Albemarle Paper Co.* v. *Moody*, *supra* at 431, unless there are "compelling indications" that they are "wrong." *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973).

Contrary to the decision of this Court in *Griggs* v. *Duke Power Co.*, *supra*, the majority opinion below erroneously sought to limit the authority of the EEOC to remedy the consequences of unlawful discrimination. The majority mistakenly assumed that the EEOC is empowered to issue rules and guidelines only with respect to wilful acts of discrimination. The majority stated that:

> "By this Guideline EEOC has injected something new and entirely different from discrimination. It has required employers not only to tolerate the religious beliefs but also the religious practices of their employees, no matter what they are, even though a hardship is inflicted on the employer, so long as it is not an undue hardship. The legislative history of the Act does not show anything that employers have done to warrant such treatment." (App. 15a.)

In fact, the Guidelines are plainly a valid exercise of the EEOC's authority. In *Griggs* v. *Duke Power Co., supra,* this Court left no doubt that the application of Title VII remedies is not limited to instances of wilful discrimination. Title VII instead provides comprehensive protection against all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification." 401 U.S. at 431. In this instance, an inflexible requirement that all copy readers perform Saturday work plainly discriminates against those who observe the Saturday Sabbath. In accordance with the EEOC's Guidelines and the cases described above, such a requirement is impermissible unless the employer shows convincingly that such inflexibility is essential for the operation of its business. The failure of the majority opinion to adhere to these well-settled principles has prejudiced the employment rights of religious minorities, created confusion as to the applicable principles of law, and threatened the free exercise of fundamental rights protected by the First Amendment.

Any possible uncertainty as to the validity of the criteria established by *Reid I,* and applied by the trial court upon remand, was eliminated by the 1972 amendments to Title VII, 42 U.S.C. § 2000e-(j), which incorporated into the statute the substance of the EEOC Guidelines. The statute now unequivocally provides that:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance . . . without undue hardship . . . ."

The sponsor of the amendment, Senator Randolph, described the provision in the following terms:

> "I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observances of the Sabbath and job discrimination divided evenly on this question.
>
> "This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved." 118 Cong. Rec. 705-06 (1972).

Although the amendment was enacted after petitioner was refused employment, it is relevant to the interpretation of the 1964 Act because Congress' purposes in the original statute were discussed in connection with its passage. *City of Burlington* v. *Turner,* 336 F. Supp. 594 (S.D. Iowa 1972), *modified,* 471 F.2d 120 (8th Cir. 1973). The amendment confirms that an employer's obligations to accommodate its business practices to its employees' religious observances are controlled by the standards set forth in the EEOC's Guidelines. Review by this Court is imperative to resolve the conflict among the Circuits and to reestablish the principles that were repudiated by the majority opinion below.

II.

The Mere Possibility of Resentment Among Other Employees Cannot Justify Respondent's Refusal Even to Attempt to Accommodate Its Business Practices to Petitioner's Religious Beliefs.

The majority opinion, on the basis of conflicting testimony regarding the possible resentment of other employees, disregarded the findings of the trial court and concluded that the mere possibility of such resentment justified respondent's refusal to make even the slightest effort to accommodate petitioner's religious observances. The novel principle adopted by the Court of Appeals will make the rights of religious minorities to equal employment opportunities contingent on the acquiescence of the majority. Such a result is plainly contrary to Congress' intention in enacting Title VII. For example, in *Diaz* v. *Pan American World Airways,* 442 F.2d 385 (5th Cir. 1971), the Fifth Circuit rejected a claim that the position of stewardess could be restricted to women because of the public's overwhelming preference for females in that job. The court emphasized that:

> "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customer to determine whether sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices that the Act was meant to overcome." 442 F.2d at 389.

Similarly, during the past two decades this Court has on numerous occasions rejected efforts to delay or deny racial desegregation because of public hostility. For example, this Court denied a claim made

by the City of Memphis that a gradual plan to desegregate public parks should be approved in order to avoid possible violence. The Court stated that the "compelling answer" to the City's claim was that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson* v. *City of Memphis,* 373 U.S. 526, 535 (1963). Similarly, in *Wright* v. *Georgia,* 373 U.S. 284 (1963), this Court overturned the convictions of black youths who refused to obey a police officer who ordered them to leave a recently desegregated park in order to avoid possible violence. The Court emphasized that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." *Id.* at 293.

Contrary to the opinion of the majority below, Title VII unequivocally requires that the rights of religious minorities to equal employment opportunities must be effectively vindicated, despite any asserted fears of public resentment or hostility to the exercise of those rights. Other courts have repeatedly recognized that such fears are readily exaggerated, and have held that the mere possibility of discontent because of an employer's accommodation to its employees' religious beliefs cannot constitute an undue hardship. *Hardison* v. *Trans World Airlines, Inc., supra; Draper* v. *U.S. Pipe & Foundry Co.,* 11 FEP 1107, 1110 (6th Cir. 1975); *Cummins* v. *Parker Seal Co.,* 516 F.2d 544, 550 (6th Cir. 1975). Similarly, the EEOC has made clear that it will accept such allegations of discontent as a justification for an employer's failure to accommodate its practices to an employee's religious observances only in those rare instances in

which an accommodation will cause "chaotic personnel problems."[5] The adoption by the majority below of a markedly different standard, under which the employment rights of religious minorities are contingent upon popular acquiescence, disregards the terms and purposes of Title VII. As Judge Edwards emphasized, review is imperative to reestablish a "consistent rule of law" applicable here and in numerous similar cases.

III.

The Majority Below Erroneously Disregarded the Finding of the District Court That Respondent Would Not Suffer Undue Hardship If It Accommodated Its Business Practices to Petitioner's Religious Observances.

The trial court concluded that respondent failed to show that it would suffer undue hardship if it exempted petitioner from Saturday work. (App. 46a.) Despite the detailed findings of fact made by the trial court in support of that conclusion, the majority of the Court of Appeals engaged in a *de novo* review of the evidence. "Astonishingly," as Judge Edwards emphasized, the majority substituted its judgment for that of the trial judge, who heard the testimony and had an opportunity to observe the demeanor of the witnesses. (App. 23a.) By so doing, the majority disregarded the unequivocal instructions of this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court . . . is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S. at 123.

[5] EEOC No. 72-0606 (Dec. 22, 1971), CCH EEOC Dec. § 6310, at 4555, 4 FEP 311 (1972).

The expansive scope of review applied by the majority below is shown clearly by its treatment of the issue of employee morale. The trial court heard conflicting testimony from witnesses who offered their opinions as to whether an accommodation to petitioner's religious observances would create resentment among other employees. An accurate evaluation of such testimony plainly requires an appraisal of the witnesses' demeanor and credibility. Nonetheless, the majority substituted its judgment for that of the trial judge, accepted respondent's contentions as to the facts (App. 23a) and asserted that "serious morale problems" might result if petitioner were exempted from Saturday work. (App. 11a.)

The trial judge conducted a factual hearing, and made detailed and careful findings in support of his ruling. He found, as Judge Edwards emphasized, that Saturday was the least busy day of the six regularly scheduled work days. (App. 35a.) He also found that there were other employees with substantially identical qualifications who were available to substitute for petitioner on Saturdays. (App. 46a.) In these circumstances, the burden was clearly upon respondent, in accordance with the EEOC Guidelines and previously-decided cases, to show convincingly that it would be a hardship to assign petitioner to work on the five busiest days each wek, and not to include him among those assigned for work on Saturdays.

Contrary to those previously-settled principles, however, the majority below mistakenly made a *de novo* review of the evidence and disregarded the well-supported findings of the trial court. Review by this Court is needed to reestablish the proper role of appellate courts in this and similar Title VII cases.

IV.

The Harsh Rule Adopted by the Courts Below for the Award of Attorneys' Fees Will Prevent Victims of Discrimination from Seeking Judicial Relief.

The courts below denied attorney's fees to petitioner on the grounds that he did not represent a class and did not obtain injunctive relief. By so doing, they have, contrary to the intentions of Congress and the decisions of numerous other courts, adopted rigid and inhospitable standards that will prevent victims of unlawful religious and racial discrimination from seeking judicial relief. Those grudging standards are wholly inconsistent both with Congress' purposes and with rules adopted by this Court for the application of identical statutory provisions for the allowance of attorneys' fees.

Section 706 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), provides as follows:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

Title II of the 1964 Act, 42 U.S.C. § 2000-b(3), contains identical language that authorizes the award of attorneys' fees in other civil rights cases. The provisions of Title II have been interpreted liberally by

this Court in accordance with Congress' purpose that such awards should uniformly be made to successful plaintiffs in the absence of "exceptional circumstances." *Aleyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240, 262 (1975); *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968).

This Court has also adopted an expansive interpretation of the attorney's fee provisions contained in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. The language of Section 718 is identical both to the attorney's fee provisions of Title II and to the provisions that are applicable here. In *Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973), this Court held that the liberal standard adopted in *Piggie Park* with respect to the attorney's fee provisions of Title II of the 1964 Act is fully applicable to Section 718.

> "This similarity of language . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, 'the two provisions share a common *raison d'etre*. . . . The enactment of both provisions was for the same purpose—to encourage individuals injured by racial discrimination to seek judicial relief.'" 412 U.S. at 428.

Unlike Section 718, the attorney's fee provisions of Title VII were enacted by Congress simultaneously with the identical provisions in Title II. The reasons set forth by this Court in *Northcross* for applying the liberal standards of *Piggie Park* to Section 718 are obviously even more forceful and compelling when, as here, the provision to which *Piggie Park* should be applied was adopted by Congress at the same time and in the same statute as Title II. In accordance

with the principles adopted by this Court in *Piggie Park* and *Northcross,* attorneys' fees should uniformly be awarded to prevailing plaintiffs in Title VII cases in the absence of "exceptional circumstances."

The courts below entirely disregarded the instructions of this Court in *Piggie Park* and *Northcross.* Those courts failed to recognize that the remedies of Title VII "are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416 (1975). The guiding principles that control the award of attorneys' fees are the broad purposes of Title VII to achieve equality of employment opportunity and to remove artificial barriers to the employment of minorities. *Albemarle Paper Co.* v. *Moody, supra* at 417. Congress intended the federal courts to exercise "final responsibility" for the enforcement of Title VII, *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 56 (1974), and, to achieve that result, it expected that "individual working grievants" would serve as private attorneys general to initiate judicial enforcement. *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 32 (5th Cir. 1968). Those purposes cannot be achieved if the grudging standard for the award of attorneys' fees adopted by the courts below is permitted to remain without correction.

Unlike the opinions below, other courts have repeatedly recognized that decisions as to the award of attorneys' fees under Title VII should not "discourage others from seeking to attack discriminatory practices." *Schaeffer* v. *San Diego Yellow Cab, Inc.,* 462 F.2d 1002, 1008 (9th Cir. 1972). To the contrary, such awards should "enable litigants to obtain competent counsel worthy of a contest with the caliber

of counsel available to their opposition." *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 719 (5th Cir. 1974). Like the decisions of this Court in *Piggie Park* and *Northcross,* the Courts of Appeals in *Schaeffer* and *Johnson* required trial courts to exercise their authority with respect to attorneys' fees in a manner that will, as Congress intended, enable individuals to seek judicial relief from unlawful discrimination.

Congress sought to encourage resort to judicial remedies by persons, such as petitioner, who seek back-pay on their own behalf, as well as by plaintiffs who seek injunctive relief on behalf of a class. Back-pay has an "obvious connection" with the "primary objective" of Title VII, *Albemarle Paper Co.* v. *Moody, supra* at 417, and every suit, "whether in name or not . . . is perforce a sort of class action for fellow employees similarly situated." *Jenkins* v. *United Gas Corp., supra* at 33. In accordance with these principles, a decision as to the award of attorneys' fees in a Title VII action cannot be premised, as it was here, upon arid distinctions between class actions and individual actions, *Evans* v. *Sheraton Park Hotel,* 503 F.2d 177, 188 (D.C. Cir. 1974), or between actions for injunctive relief and actions for back-pay.

The mere fact that a suit seeks to recover back-pay for an individual plaintiff cannot constitute an "exceptional circumstance" that justifies the denial of attorneys' fees. Such suits are the most routine of Title VII complaints, and at least three other Courts of Appeals have upheld awards of attorneys' fees where the individual plaintiff obtained less than $4,000 in back-pay. *Lowry* v. *Whitaker Cable Corp.,* 472 F.2d 1210 (8th Cir. 1973); *Taylor* v. *Safeway Stores,*

Inc., 11 FEP 449 (10th Cir. 1975); *Evans* v. *Sheraton Park Hotel, supra.* Individual plaintiffs such as petitioner, who was awarded less than $8,000 in back-pay, and whose suit has already required two appeals to the Sixth Circuit, cannot hope to secure effective representation if, despite specific statutory authorization, awards of attorneys' fees are arbitrarily denied to those who do not represent a class and do not obtain injunctive relief. Unless this Court provides prompt guidance regarding the standards that should control the award of attorneys' fees, the important purposes that Congress sought to achieve in Title VII will be impeded and frustrated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

Before WEICK, EDWARDS and CELEBREZZE, *Circuit Judges.*

WEICK, *Circuit Judge.*

Appellant Reid has appealed from an order of the District Court denying his motion to assess attorney's fees against appellee, Memphis Publishing Company. The Publishing Company has cross-appealed from a judgment entered against it in favor of Reid in the amount of $7,349, for damages for allegedly failing to employ him as a copyreader in one of its newspapers, because of his religion.

This is Reid's second appeal. Our opinion in the first appeal is reported at 468 F.2d 346 (6th Cir. 1972).

In his complaint Reid alleged that the defendant failed to employ him as a copyreader in one of its newspapers, Memphis Press Scimitar, because of his race (Negro) and his religion (Seventh Day Adventist) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* He prayed for a mandatory injunction ordering the defendant to employ him as a copyreader, awarding him back pay from the date of his application for employment (September 1967), and attorney's fees.

The District Court heard the evidence and on August 13, 1971 it adopted findings of fact and conclusions of law. The Court found that the defendant did not discriminate against the plaintiff in failing to employ him, either on account of his race or his religion.[1]

Relying on our decision in *Dewey* v. *Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970), *affirmed* by an equally

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[1] The findings of fact and conclusions of law are set forth in our opinion in the first appeal and need not be repeated here.

divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), the District Court held that the Press Scimitar was not required to accommodate Reid's religious practice of not working on Saturdays inasmuch as the position of copyreader, for which Reid had applied, required work on Saturday. The Press Scimitar had never employed a copyreader who would not work on Saturdays. The District Court dismissed Reid's complaint.

On appeal (Reid's first appeal) the panel approved the findings of fact of the District Court and also its conclusions of law with respect to the racial issue, and that issue is no longer in the case.

The panel distinguished *Dewey* on the ground that it involved a major issue of arbitrability which is not present in the case at bar.[2]

Dewey was further distinguished on the ground that Regulation § 1605.1 of E.E.O.C. (39 C.F.R. 1605, adopted July 10, 1967) requiring accommodation, had not been adopted and was not in force at the time the controversy in *Dewey* arose, although the District Court in that case had erroneously applied it retroactively. This regulation was in full force and effect at the time Reid applied to defendant for employment.

The employer in *Dewey* also permitted its employees to arrange for substitutes when they were required to work on Saturdays or Sundays, and we held that was an accommodation.

The panel remanded the case to the District Court to determine—

[2] The question of arbitrability was finally set to rest by the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). This question may have been the sole reason for the division of the Supreme Court in *Dewey*.

> . . . whether the Press Scimitar could make "reasonable accommodation" to the religious practices of appellant Reid "without undue hardship." (468 F.2d 346)

It is interesting to note that in the "Conclusion" of his brief filed in the first appeal in this Court on March 8, 1972, Reid —

> . . . respectfully prays this Court to reverse the decision of the district court and order the defendant appellee immediately to offer acceptable employment to the plaintiff.

Notwithstanding this prayer, it appears from the record in the present appeal that Reid nearly two years previously had accepted employment from another employer on July 1, 1970, at a salary higher than that offered by defendant. No mention was made of this fact in the findings of fact and conclusions of law adopted by the District Court at the first trial on August 13, 1971, nor in our opinion in the first appeal. 468 F.2d 346 (6th Cir. 1972). We would think that if this fact was in evidence the District Judge would have included it in his findings.

In his brief filed in the present appeal (second appeal) Reid offers the following explanation of his conduct, in footnote 1 on page 11:

> Today plaintiff, because of the lengthy delays of litigation, has other employment. He sought this employment to survive and to mitigate damages. Like teachers discharged without due process, he is entitled to backpay. If he were still interested in this job, the defendant could, for the time, attempt an accommodation. The court below has denied attorneys fees because no injunction is now necessary. The net ef-

> fect of that ruling is to penalize plaintiff and his counsel for attempting to mitigate damages.

No supporting record references are cited. This explanation simply does not make sense. Reid had already accepted other satisfactory employment at a higher salary, more than a year prior to the time the District Court adopted its findings of fact and conclusions of law at the first trial.

At the time Reid made application to defendant for the position of copyreader, Reid had employment as Editor of Tri-State Defender, at a salary of $100 per week. His beginning salary in defendant's employ would have been $125 per week plus stated annual increases if his work was satisfactory.

The claim that he accepted the new employment to mitigate damages is not understandable. He was not required to quit his employment at Tri-State Defender in order to secure a higher salary, for the benefit of the defendant, and he did not do so.

Furthermore, on the remand it does not appear that Reid offered to give the defendant the benefit of his higher salary to reduce his claim for damages, and the District Court in assessing damages allowed only the difference between the salary offered by defendant ($125 per week) and his salary at Tri-State Defender ($100 per week) in computing damages at $7,349, for the period from October, 1967 through June, 1970. Thus Reid's new position was not accepted by him in order to "survive and mitigate damages" as his brief alleges.

On the remand it was clear that the issue of mandatory injunction had long become moot, and the District Judge considered only the question of damages.

The District Court stated:

> Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copyreader for the defendant and the pay he received until he took a positon paying more than he would have earned as a copyreader for the defendant, and attorney's fees. (369 F.Supp. at 686)

[1] The District Court was fully conversant with all of these facts when it denied attorney's fees to Reid. In our opinion it did not abuse its discretion in so doing, and its judgment, from which Reid appealed, is affirmed.

I

The defendant owned and operated two large newspapers in Memphis, Tennessee, named The Commercial Appeal, which is a morning newspaper, and The Memphis Press-Scimitar, which is an afternoon newspaper, the Press-Scimitar publishing three editions daily (excluding Sundays) and two on Saturdays. The Commercial Appeal publishes every day, including Sunday.

Each newspaper maintains its own editorial department and they operate competitively, although they do not raid each other's personnel. The editorial departments include editors, copyreaders and reporters.

In September, 1967 Reid applied to the News Editor of the Press Scimitar for the position of copyreader. The Press Scimitar had ten copyreaders. One of its copyreaders, George Lapides, desired to be transferred to the Sports Department, and if the transfer were made there would be a vacancy. Lapides worked on Saturdays. Reid

had been in the employ of the Tri-State Defender, a small weekly newspaper, located in Memphis.

The Press Scimitar's News Editor arranged for Reid to take a test, which he passed, and he was then sent to the Managing Editor, and by him to the Editor, for a final interview. Both News and Managing editors recommended his employment. At the final interview with the Editor, Reid's compensation of $125 per week was agreed upon, which was $25 per week more than he was receiving at Tri-State Defender.

During the course of his conversation with the Editor, Reid mentioned for the first time that he was a member of the Seventh Day Adventist, and that he could not accept employment requiring him to work on Saturdays. This fact had not been disclosed either to the News Editor or to the Managing Editor.

To employ Reid as a copyreader would have created serious and difficult problems for the newspaper, because Reid would never work on any Saturday and would be off work more than fifty Saturdays in a year. The Press Scimitar publishes two editions on Saturday; and even in an emergency when momentous news breaks, which has to be processed immediately because otherwise it becomes stale, the newspaper could never call upon Reid for any help on Saturdays.

The only position which the Press Scimitar had open was one which required work on Saturdays, and the man whom Reid was to replace if he was hired, worked on Saturdays.

The Commercial Appeal, on the other hand, publishes on Saturdays and Sundays. If it had an opening for a copyreader it could have accommodated Reid by having him exchange with a copyreader who wanted to work on Saturdays instead of Sundays. Commercial Appeal had employed Negroes as well as Seventh Day Adventists.

Reid did not apply to the Commercial Appeal for any position, and there was no proof offered that it had an opening for a copyreader.

Copyreaders are specialists and are not readily interchangeable. The minimum number of copyreaders employed by the Press Scimitar from Monday through Friday, is seven; on Saturday the minimum is five.

Copyreaders serve as a "reduction group" to sift through, sort out, reduce, and locate in appropriate places in the newspaper all of the news which comes in by wire, from reporters and from other sources. The newspaper would not have space to publish all of the news which it receives, and not all news which it receives is newsworthy. It takes real specialists to handle this work.

The Press Scimitar's copyreaders include a news editor, called a "slot man", a telegraph man, and a man to handle mid-south news; all of these positions require special skills and experience. The remaining copyreaders handle routine work of lesser importance, such as special features, make up, and markets.

The heaviest publication days are the first five days of the week, and the best qualified copyreaders are usually assigned to work on those days, leaving Saturdays as their day off. These are all men who would have seniority over Reid, if hired. It is necessary, occasionally, for copyreaders to work overtime during the first five days of the week.

The problems of work-scheduling copyreaders is set forth in the findings of fact adopted by the District Court, on the remand and the Court's findings are appended hereto as Appendix "A".

Even under ordinary circumstances, without anyone claiming special privileges, the work-scheduling of copyreaders presents a difficult task. This task is performed by the News Editor, with the approval of the Editor. In

making the assignments he must take into account their special skills and adaptability for the work. The normal workday for copyreaders is eight hours; it ranges, however, from five o'clock a.m. until 4:30 p.m., except on Saturday when it extends only to 1:30 p.m. The News Editor must take into account absences of the copyreader on account of accident, illness, and vacation. Vacations run for two, three or four weeks, depending on length of service. Seniority must be taken into account also. Reid, as a new employee, would have no seniority.

In order for Reid to be accommodated, another copyreader who had seniority over Reid, would have to be involuntarily assigned to take his place on every Saturday, even though the other man did not desire to work on that day.

In *Dewey, supra,* there was no problem in providing substitutes for employees who did not want to work on Saturdays or Sundays, because that case involved a manufacturing plant with many employees who were doing the same type of work as Dewey. Some were pleased to have Dewey work in their place on Sundays, and they would substitute for him on Saturdays when requested; but Dewey finally took the position that it was a sin for him to ask anyone to substitute for him. The employer in *Dewey* required the employees to make their own arrangements in order to avoid discrimination, and when Dewey declined and refused to work on Saturdays he was discharged.

Our case presents a problem entirely different than *Dewey,* because it involves only a limited number of specialists.

Copyreaders having seniority usually do not want to work on Saturday. They have already worked forty hours during the first five days of the week, and some may even have worked overtime. If they are required to work on Saturdays they would be entitled to overtime compensa-

tion. The Editor was of the opinion that even overtime was not a reasonable alternative. He was of the view that in order to accommodate Reid it would have been necessary for his newspaper to employ still another copyreader in addition to Reid.

In his findings of fact the District Judge found that the proof of expense which the newspaper would incur in order to accommodate Reid, was not specific. We disagree. The proof was specific that overtime would cost $77 per day. The extra copyreader would cost about $125 per week, which was the salary offered to Reid by Press Scimitar.

The Editor was of the opinion that to hire Reid, with all Saturdays off, would create a serious morale problem among the other nine copyreaders who would have seniority over Reid, but who, nevertheless, would be involuntarily assigned to take his place for Saturday work. The copyreader could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated against and were being penalized because they did not hold the same religious beliefs as Reid.

Furthermore, because Reid would never work on Saturdays, he could not be considered for promotion to better positions such as News Editor, Managing Editor, and Editor, all of whom work on Saturdays when necessary.

The District Court also made the following ultimate finding with respect to hardship:

> While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof. (369 F.Supp. at 690).

Thus, the District Court was of the view that it is all right to impose a hardship on an employer, so long as it is not an *undue* hardship.

It is noteworthy that the District Court made no finding that the Press Scimitar discriminated against Reid on account of his religion. All that it found was that it would not have been an undue hardship for the Press Scimitar to accommodate Reid's religious practice.

Webster's New International Dictionary defines hardship as follows:

> 1. Hard circumstances of life; 2 a thing hard to bear; specific cause of discomfort or suffering as poverty, pain, etc. Syn. difficulty.

Undue is defined:

> 1. Not yet owing or payable as a debt; 2 improper; not appropriate or suitable; 3 not just, legal or equitable; 4 excessive, unreasonable, immoderate.

The District Court was of the view that Press Scimitar should have employed Reid on a trial basis in order to see how it would work out; but the District Court had already found that this would create a hardship. It would have imposed an additional hardship and expense on the newspaper "to try him out," when it knew it would not work.

Apparently no hardship was imposed on Reid because in July, 1970, long before the first trial, he accepted other employment at a higher salary, and which employment apparently did not require him to work on Saturday. He is no longer interested in working for Press Scimitar. All he wants now are damages, plus attorney's fees.

The undue hardship imposed on the Press Scimitar in the present case, as shown by the evidence and the findings of fact of the District Court include:

(1) Requiring it to employ Reid as a copyreader in a position which regularly required working on Saturdays, and to replace an employee who worked on Saturdays, when Reid declined to work on these days because of his religious beliefs and practices as a Seventh Day Adventist.

(2) To employ Reid would require the employer to assign, involuntarily, other copyreaders who would have seniority over Reid, to take his place, thereby incurring overtime expense amounting to $77 per day. The Editor testified that even overtime was not a reasonable alternative, and that it would probably be necessary to employ an additional copyreader. Thus, to employ Reid would require the employer to employ two copyreaders, when it needed only one.

(3) The involuntary assignment of other copyreaders to work on Saturday to substitute for Reid, when they had seniority over Reid, who had no seniority, would create serious morale problems among the other copyreaders.

[2] In our opinion the ultimate finding of the District Court that the accommodation of Reid's religious practice of not working on Saturdays would not have imposed an undue hardship on his employer, is not supported by substantial evidence and is clearly erroneous.

II

Title VII of the Civil Rights Act of 1964 contains two sections which are relevant to the controversy here.

42 U.S.C. § 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; . . . (Emphasis added).

42 U.S.C. § 2000e-5(g) provides in relevant part:

. . . No order of the Court shall require . . . the hiring reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than *discrimination* on account of race, color, religion, sex, or national origin . . . (Emphasis added).

These two statutes are plain and unambiguous. They are aimed solely at discrimination and nothing else.

The legislative history of the 1964 Act indicates that Congress was concerned that management prerogatives should be left undisturbed to the greatest extent possible, and that internal affairs of employers must not be interfered with except to the limited extent that correction is required in *discriminatory* practices. 1964 U.S.Cong. & Admin.News, at p. 2516.

EEOC recognized the congressional mandate in its initial 1966 Guidelines. These Guidelines provided:

Section 1605.1(a):

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."

Section 1605.1(b):

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

These two guidelines carried into effect the will of Congress as expressed in 42 U.S.C. §§ 2000e-2(a) and 2000e-5(g). They expressly recognized that the employer was free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, even though it may not operate with uniformity in its effect upon the religious observances of his employees. The job applicant, knowing or having reason to believe that such requirements would conflict with his religious obligations, was not entitled to demand any alterations in the requirements to accommodate his religious needs. Under this regulation Reid would not have been entitled to demand any accommodation from Press Scimitar to accommodate his religious practices.

It was not until 1967 that EEOC abandoned the 1966 Guidelines and adopted a new Guideline, which provides as follows:

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire

employes who regularly observe Friday evening and Saturday, or some or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000-12 [§2000e-12(b)]) [32 F.R. 10298, July 13, 1967]

This guideline for the first time decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate all of the religious practices of his employees or prospective employees so long as they did not impose an undue hardship on him.

[3] We submit that a fair reading of the two statutes hereinbefore quoted discloses no such legislative intent, nor is the guideline supported by the legislative history which we have detailed in *Dewey*. The clear language of the statutes does not indicate that Congress ever intended to coerce employers into accommodating all of the religious practices of their employees or prospective employees.

Title VII, in proscribing discriminatory practices in employment, served a legitimate and laudable legislative purpose; the 1967 EEOC Guideline 1605.1 does not. By this Guideline EEOC has injected something new and entirely different from discrimination. It has required employers not only to tolerate the religious beliefs but also all of the religious practices of their employees, no matter what they are, even though a hardship is inflicted on the employer, so long as it is not an undue hardship. The legislative history of the Act does not show anything that employers have done to warrant such treatment.

In *Dewey, supra,* the District Court applied the 1967 Guideline notwithstanding the fact that it was not in force at the time the claim in that case accrued. The 1966 regulation was actually in force when the controversy in *Dewey* arose. We expressed doubts in footnote 1, in *Dewey,* as to the authority of EEOC to adopt the 1967 Guideline which was erroneously applied by the District Judge. We stated:

> It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted. (429 F.2d at 331, n.1)

This doubt was based on the fact that the two statutes hereinbefore quoted were aimed solely at discrimination. Actually the statutes needed no Guideline or Regulation to interpret them.

[4] While Congress has authority to grant power to an administrative agency to prescribe rules and regulations to administer a statute in order to carry into effect the will of Congress as expressed in the statute, that authority does not include the power to make law, because no such power can be delegated by Congress. The two statutes expressed nothing about a requirement for employers to accommodate the religious practices of its employees.

In *Manhattan Gen. Equip. Co.* v. *Commissioner,* 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936), the Supreme Court held:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end *is not the power to make law—for no such power can be delegated by Congress —but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch* v. *Tilden Produce Co.* 265 U.S. 315, 320-322 [44 S.Ct. 488, 68 L.Ed. 1034]; *Miller* v. *United States,* 294 U.S. 435, 439, 440 [55 S.Ct. 440, 79 L.Ed. 977], and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable .
>
> *International R. Co.* v. *Davidson,* 257 U.S. 506, 514 [42 S.Ct. 179, 66 L.Ed. 341]. The original regulation as applied to a situation like that, under review is both inconsistent with the statute and unreasonable. (Italics added) (*Id.* at 134-135, 56 S.Ct. at 400).

See also *M. E. Blatt Co.* v. *United States,* 305 U.S. 267, 59 S.Ct. 186, 83 L.Ed. 167 (1938); *Koshland* v. *Helvering,* 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268 (1936); *Commissioner* v. *General Mach. Corp.,* 95 F.2d 759 (6th Cir. 1938).

On March 24, 1972, nearly five years after the rights of the parties in the present case had accrued, Congress amended the Act to define religion. 42 U.S.C. § 2000e(j). This definition reads as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The subsequent enactment of § 2000e(j) in 1972 cannot be relied on to establish a Congressional intent with respect to the 1964 statute, which was not expressed in that statute.

As well stated by the Supreme Court in *Helvering* v. *Credit Alliance Corp.,* 316 U.S. 107, 112, 62 S.Ct. 989, 992, 86 L.Ed. 1307 (1942):

> Section 115(h) was amended in 1938, * * * subsequent to the consummation of the transaction here in question, to include money or property, but we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived from the policy disclosed by the subsequent amendment.

In *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), Chief Justice Burger, who wrote the opinion for the Court, stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of quali-

fications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. (*Id.* at 430-431, 91 S.Ct. at 853).

Griggs involved § 703(h) of the Act relating to tests and EEOC Guideline issued on August 24, 1966 interpreting that section to permit only the use of job related tests. The Supreme Court held that this regulation was a correct interpretation of the intent of Congress.

We do not read *Griggs* as requiring the appellant, in order to accommodate Reid, to suffer a hardship, to hire two copyreaders when it needs only one, to require it to incur overtime expense of $77 per day, or to require it to involuntarily assign other copyreaders who would have seniority over Reid, to substitute for him on Saturdays, thereby creating havoc and serious morale problems among its employees.

The judgment of the District Court in Appeal No. 74-1761, which denied attorneys' fees, is affirmed.

The judgment of the District Court in Appeal No. 74-1762, which awarded damages against the defendant, is reversed, and the case is remanded for dismissal of the complaint.

APPENDIX "A"

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services

and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copyreaders assist the News Editor in this task.

Copyreaders sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copyreaders sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copyreaders for appropriate action.

Copyreaders usually develop special abilities in addition to their general abilities and normal operations require a crew of copyreaders who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section, special features, makeup and markets.

The Press-Scimitar's normal complement of copyreaders is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copyreaders is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copyreaders possess more than one speciality, in addition to their general ability, none possess all of the specialties; and while some by additional training might acquire additional special skills, experience has

demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copyreaders are not interchangeable with all other copyreaders.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copyreaders' services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copyreader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copyreader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copyreaders. Sickness takes about another eight weeks. With a normal complement of ten copyreaders, including the News Editor, overtime work is required of copyreaders from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copyreaders. Trial Exhibit 4 is a May 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copyreaders are pulled off the copy desk for other

editorial assignments, and on some occasions reporters are used as copyreaders.

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The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copyreader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copyreader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copyreaders on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copyreader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copyreader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copyreaders, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copyreaders are not interchangeable. However, the proof

also shows that Saturday work is infrequent for some copyreaders and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copyreaders with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

EDWARDS, *Circuit Judge* (dissenting).

In *Reid* v. *Memphis Publishing Co. (I)*, 468 F.2d 346 (6th Cir. 1972), this court upheld the applicability and constitutionality of an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974), and remanded the case to the District Court for hearing and determinations of fact concerning "undue hardship."

No judge of the court filed any motion for reconsideration in banc.

On remand the District Judge reheard the case, made extensive findings of fact and entered judgment for the plaintiff. He held that defendant had made *no effort whatsoever to accommodate plaintiff Reid's religious beliefs.* His critical findings of fact were as follows:

> Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the *Dewey* case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. *Reid* v. *Memphis Publishing Co., supra,* at page 349. In the instant case the defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulations and the Court of Appeals remand.

The regulation specifies an example of § 1605.1(b) wherein it provides:

> "Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

> While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

The District Judge awarded plaintiff damages of $7,349 —the carefully computed difference between the salary Reid would have earned with defendant and what he actually did earn in the years before he secured a better paying job. He denied plaintiff's request for attorney fees.

Astonishingly, my colleagues now reverse the District Court's carefully considered judgment simply by accepting the defendant's contentions as to the facts. As I view the matter, the majority opinion retries this case on the written record, giving no weight to the great advantage the trial judge has in seeing, hearing and judging the credibility of the witnesses.

Additionally, the majority opinion has the effect of reversing the burden of proof which the regulation places upon the employer to establish undue hardship.[1]

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[1] For quite different reasons, both of my respected colleagues have deep-seated beliefs that the regulation at issue, 29 C.F.R. § 1605.1 (1974) (now enacted in the same words in statutory form, 42 U.S.C. § 2000e(j) (Supp. III, 1973)) is unconstitutional.

Judge Weick has expressed his concern that the regulation violates employer's constitutional rights in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 331 n. 1, 334-35 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971). Judge Celebrezze has written strongly in dissent in *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 at 554-560 (6th Cir. 1975) (A. Celebrezze, J., dissenting), that the regulation (1605.1) is a violation of the establishment of religion clause of the First Amendment to the United States Constitution.

A full description of the case follows, including the bulk of the District Judge's opinion and findings of fact.

This case represents the second appeal in a continuing controversy between appellant Reid, a black member of the Seventh Day Adventist Church, and the company which publishes both the Memphis Press-Scimitar and the Commercial Appeal. In the first appeal, *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), we held, contrary to the view of the District Judge, that an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974),[2] was applicable at the time Reid

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Neither of these constitutional arguments is frivolous and neither has been precisely dealt with by the United States Supreme Court. Each has, however, been rejected by a panel opinion of this court. *See Reid* v. *Memphis Publishing Co.*, *supra*; *Cummins* v. *Parker Seal Co.*, *supra*. In neither instance has there been a motion for rehearing en banc by any judge of this court.

[2] § 1605.1 OBSERVATION OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his

was denied employment when he refused to work on Saturday due to his religious beliefs. The regulation in question requires employers to make "reasonable accommodations" to the religious needs of employees where such can be accomplished "without undue hardship."

By holding this regulation to be applicable, we distinguished this case from *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), where this court's majority opinion had held that this same regulation was not applicable at the time of the discharge there complained of and that it was not retroactive in effect.

Subsequent to defendant's refusal to hire Reid in this case, but prior to our original case, the United States Congress amended Title VII so as to add to 42 U.S.C. § 2000e (1970), the following language:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.
>
> Act of Mar. 24, 1972, Pub.L. No. 92-261, § 2, 86 Stat. 103, amending 42 U.S.C. § 2000e (1970) (codified at 42 U.S.C. § 2000e(j) (Supp. III, 1973)).

We noted in our prior opinion:

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religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

> As shown in *Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972) 4 E.P.D. § 7902, legislative history of this amendment stresses that the regulation (29 C.F.R. § 1605.1 did express the prior intention of Congress. This subsequent congressional affirmation strengthens our conclusion about the validity of the regulation.
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> *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972).

On remand additional proofs were taken. Judge McRae there held on the crucial issue not only that the facts in the record did not disclose any "*undue* hardship" to the potential employer, but that defendant had made no effort whatever to accommodate Reid's religious beliefs. The District Judge reiterated a prior finding (made in the original case) that there was no intentional discrimination on the part of the defendant, but as indicated above, he awarded Reid $7,349 in damages.

Plaintiff's appeal pertains solely to the disallowance of the attorney fees, while defendant contends that under the facts of its particular business, no accommodation to Reid's religious objection to Saturday work was possible and, hence, that its failure to make any attempt to accommodate was irrelevant.

As to this last issue, Judge McRae's critical findings were:

Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copyreader for the defendant and the pay he received until he took a position paying more than he would have earned as a copyreader for the defendant, and attorney's fees.

For clarity, the Court reiterates certain findings, namely, that the plaintiff was well qualified to become a copyreader for the defendant; that plaintiff was a member of the Seventh-Day Adventist Church; that one of the religious principles of the Seventh-Day Adventist Church is that its members should not work on Saturday; that plaintiff was offered the job as a copyreader on the Press-Scimitar on the condition that he make himself available to work on any day, including Saturday.

The record further establishes that the Memphis Press-Scimitar, the one of the defendant's two newspapers on which there was an opening for a copyreader, publishes three editions Monday through Friday, two editions on Saturday and no editions on Sunday, and that the plaintiff declined to accept the position due to his sincere religious belief that he should not work on Saturday.

In accordance with the direction of the Court of Appeals Opinion, further evidence was offered on the employment practices of the Memphis Commercial Appeal, the other newspaper published by the defendant publishing company.

The proof shows that the Commercial Appeal had at the time in question two employees who were of the Seventh-Day Adventist faith and who were not required to work on Saturday. These employees were Lindley Richert and Glenn Allen. Richert was employed by the Commercial Appeal as a copyreader. The editor of the Commercial Appeal who employed Richert knew that Richert was a Seventh-Day Adventist and that he would not work on Saturday. However, since the Commercial Appeal publishes seven days per week, it has need of copyreaders seven days a week. Sunday was a less preferable work day for many of the copyholders; therefore, the editor employed Richert and assigned him to Sunday work on a regular basis with Saturday as one of his regular days off.

In the case of Allen, he had been an employee of the Commercial Appeal before he became a Seventh-Day Adventist. He worked in the Commercial Appeal's library, which is staffed seven days a week. Allen customarily worked on Sunday and continued to work on Sunday after he became a Seventh-Day Adventist.

No changes in work schedules were required to be made by the Commercial Appeal, in order to accommodate Saturdays off for either Richert or Allen. On the contrary, their ready willingness to work on Sundays was well-suited to the Commercial Appeal's seven-days-per-week publishing requirement and was actually an accommodation to the newspaper.

At the supplemental evidentiary hearing the defendant offered further testimony pertaining to the duties of copyreaders at the Memphis Press-Scimitar in an effort to meet the burden of proof cast upon it by the E.E.O.C. regulation determined to be applicable by the Court of Appeals, namely, that the accommodation of granting the plaintiff Saturday off would create an undue hardship on the newspaper.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copyreaders assist the News Editor in this task.

Copyreaders sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copy-

readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copyreaders for appropriate action.

Copyreaders usually develop special abilities in addition to their general abilities, and normal operations require a crew of copyreaders who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section; special features, makeup and markets.

The Press-Scimitar's normal complement of copyreaders is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copyreaders is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. This scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copyreaders possess more than one specialty, in addition to their general ability, none possess all of the specialties; and while some by additional training might acquire additional special skills, experience has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copyreaders are not interchangeable with all other copyreaders.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copyreader services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copyreader is eight hours. The copy work desk must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copyreader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copyreaders. Sickness takes about another eight weeks. With a normal complement of ten copyreaders, including the News Editor, overtime work is required of copyreaders from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schdules for the copyreaders. Trial Exhibit 4 is a May, 1973 schedule and Trial Exhibit 5 is a a collective exhibit of five weekly schedules in November and December, 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copyreaders are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copyreaders.

At the time plaintiff was being considered for the copyreader position, the Editor of the Press-Scimitar was planning to transfer George Lapides, one of the copyreaders, to another position, and he planned to put plaintiff, if employed, into the position to be vacated by Lapides. It was customary for Lapides to work on Saturday.

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copyreader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copyreader. Because the plaintiff

was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copyreaders on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copyreader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copyreader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but there were not for religious reasons. Their requests were refused. The proof shows that all copyreaders, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copyreaders are not interchangeable. However, the proof also shows that Saturday work is infrequent for some copyreaders and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copyreaders with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

The above noted proof addresses itself primarily to the "undue hardship" test which was offered alternatively in the event that the Court does not adopt a finding which supports the defendant's persistent position, namely, that granting a member of the editorial department of the Memphis Press-Scimitar a regular day off for religious purposes is contrary to the policy of the newspaper which is applied equally to all personnel.[1]

By taking this position the defendant effectively contends that the plaintiff's request to be relieved from Saturday work would be beyond the scope of a "reasonable accommodation" of his religious practices. This Court concludes that the request of the plaintiff to be relieved of Saturday work upon the basis of religious beliefs is within the scope of the "reasonable accommodation" test imposed by Congress and those authorized to promulgate E.E.O.C. regulation 1605.

Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the *Dewey* case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. *Reid* v. *Memphis Publishing Co., supra,* at page 349. In the instant case the defendant is unwilling to offer to anyone an accommodation in the frm of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is in-

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[1] While there is no proof that any person who observes the Sabbath on Sunday has indicated unwillingness to do so on religious grounds, the customs and practices of the community and the newspaper permit the employees of the Memphis Press-Scimitar to be off on Sunday except in unusual circumstances.

cumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example in § 1605.1(b) wherein it provides:

> "Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copyreaders of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copyreaders of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the

test is *undue* hardship, which this Court does not believe to be established by the proof.

This Court has previously found that there was no intentional discrimination on the part of defendant personnel due to plaintiff's religion. Similarly, there is no proof that the executives of the defendant were aware of the obligations imposed upon them by the regulation at the time of the refusal to hire. However, the opinion of the Court of Appeals in this case applied *Griggs* v. *Duke Power Company,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and quoted therefrom with regard to the principle that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. 468 F.2d at page 350. " . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co., supra* [401 U.S.] at page 432, 91 S.Ct. at page 854.

It must be remembered that Congress by the Civil Rights Act of 1964 recognized and established new statutory rights of employees in the areas of race, religion and sex. This imposed obligations on employers and, to some extent, employees to change some long standing policies and practices.

These findings of fact we review, of course, under the "clearly erroneous" standard. Fed.R.Civ.P. 52(a). Here the record shows that Saturday was the lightest work day of the six regularly scheduled work days. It does not show that accommodating Reid's religious beliefs would have occasioned any added expense of any kind to defendant, unless we assume that other employees would have refused Saturday assignments because Reid was exempted from them. There is no evidence which supports such an assumption because, as the District Judge pointed out, defendant did nothing whatever to explore what it could do to accommodate Reid's religious beliefs. At a minimum, I believe

the regulation here involved (now adopted by law) requires more than a simple assertion by an employer that it had always required Saturday availability and would not hire an employee who was not prepared to work on that day.

Furthermore, although the District Judge made no reference to it and placed no reliance upon it, this same employer through its other wholly-owned paper, the Memphis Commercial Appeal, operated a seven-day a week newspaper where Reid's ready availability for *Sunday* work would have been a distinct asset. Yet the record discloses no consideration at all by the employer of any possible exchange of personnel.

There may, of course, be situations where a prospective employee's unavailability for Saturday work would make his employment truly an undue hardship. A small newspaper which needed only one sports reporter could hardly hire a Seventh-Day Adventist for that spot without "undue hardship." This case, however, presents no such facts. The District Judge's findings of fact are accurate and complete. They certainly are not "clearly erroneous." The judgment of the District Court as to damages should be affirmed.

As to plaintiff's appeal from denial of attorney fees, the case should be remanded for further consideration. This is a Title VII action where Congress has squarely authorized attorney fees. 42 U.S.C. § 2000e-5(k) (1970); *See Alyeska Pipeline Service Co.* v. *The Wilderness Society,* —— U.S. ——, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

Appendix B

Memorandum Decision

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The plaintiff seeks damages based upon religious discrimination against him by the defendant newspaper publisher. The case is presently before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *Reid* v. *Memphis Publishing Co.,* 468 F.2d 346 (C.A.6 1972). Following the remand, a supplementary evidentiary hearing was conducted by this Court in the light of the Court of Appeals opinion.

At the first hearing, the District Court, relying upon *Dewey* v. *Reynolds Metals Company,* (C.A.6 1970) 429 F.2d 324, affirmed by a divided court, 402 U.S. 689, took the view that the burden of proof was upon plaintiff to prove that he was not hired because of discrimination based upon religion. This Court found as a fact that there was an established policy on the part the Memphis Press Scimitar that all of its employees be available to work on Saturday and took the further view that there was no duty on the part of an employer to accommodate an employee's or potential employee's belief contrary to the employer's established and required work schedule. This Court concluded that religious discrimination had not been established by the plaintiff's proof and, therefore, that the defendant had not been guilty of a violation of the Civil Rights Act of 1964 for a refusal to hire plaintiff because of discrimination based on religion.

The Court of Appeals distinguished the *Dewey* case, *supra,* from the instant case. In doing so, it noted that the E.E.O.C. regulation relied upon by the District Judge at the time of Dewey's discharge was not in effect but that at

the time that the plaintiff in this case applied for employment the regulation was in effect. That regulation was adopted July 10, 1967, and it provides, in part, as follows:

> "Part 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION
>
> §1605.1 Observation of the Sabbath and other religious holidays.
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> • • •
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703 (a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. 1605.

The Court of Appeals held that the question on remand is not whether the defendant's rules, as established and applied by the Press-Scimitar, were intentionally discriminatory as to religion, but rather whether the Press-Scimitar

could make "reasonable accommodation" to the religious practices of plaintiff "without undue hardship". *Reid* v. *Memphis Publishing Co., supra,* at page 351. Plaintiff claims that the Press-Scimitar could have hired him as a copy reader to work Monday through Friday without undue hardship on the conduct of defendant's business. On the other hand, the defendant claims that to have hired the plaintiff as a copy reader to work Monday through Friday, not only regularly but also without ever being subject to work on Saturday, would have been an undue hardship on the conduct of defendant's business, and therefore defendant could not make a reasonable accommodation to plaintiff's religious practice.

Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copy reader for the defendant and the pay he received until he took a position paying more than he would have earned as a copy reader for the defendant, and attorney's fees.

For clarity, the Court reiterates certain findings, namely that the plaintiff was well qualified to become a copy reader for the defendant; that plaintiff was a member of the Seventh-Day Adventist Church; that one of the religious principles of the Seventh-Day Adventist Church is that its members should not work on Saturday; that plaintiff was offered the job as copy reader on the Press-Scimitar on the condition that he make himself available to work on any day, including Saturday.

The record further establishes that the Memphis Press-Scimitar, the one of the defendant's two newspapers on which there was an opening for a copy reader, publishes

three editions Monday through Friday, two editions on Saturday and no editions on Sunday, and that the plaintiff declined to accept the position due to his sincere religious belief that he should not work on Saturday.

In accordance with the direction of the Court of Appeals Opinion, further evidence was offered on the employment practice of the Memphis Commercial Appeal, the other newspaper published by the defendant publishing company.

The proof shows that the Commercial Appeal had at the time in question two employees who were of the Seventh-Day Adventist faith and who were not required to work on Saturday. These employees were Lindley Richert and Glenn Allen. Richert was employed by the Commercial Appeal as a copy reader. The editor of the Commercial Appeal who employed Richert knew that Richert was a Seventh-Day Adventist and that he could not work on Saturday. However, since the Commercial Appeal publishes seven days per week, it has need of copy readers seven days a week. Sunday was a less preferable work day for many of the copy readers; therefore, the editor employed Richert and assigned him to Sunday work on a regular basis with Saturday as one of his regular days off.

In the case of Allen, he had been an employee of the Commercial Appeal before he became a Seventh-Day Adventist. He worked in the Commercial Appeal's library, which is staffed seven days a week. Allen customarily worked on Sunday and continued to work on Sunday after he became a Seventh-Day Adventist.

No changes in work schedules were required to be made by the Commercial Appeal, in order to accommodate Saturdays off for either Richert or Allen. On the contrary, their ready willingness to work on Sundays was well-suited to the Commercial Appeal's seven-days-per-week publishing requirement and was actually an accommodation to the newspaper.

At the supplemental evidentiary hearing the defendant offered further testimony pertaining to the duties of copy readers at the Memphis Press-Scimitar in an effort to meet the burden of proof cast upon it by the E.E.O.C. regulation determined to be applicable by the Court of Appeals, namely, that the accommodation of granting the plaintiff Saturday off would create an undue hardship on the newspaper.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copy readers assist the News Editor in this task.

Copy readers sit at a horseshoe shaped desk. The News Editor or person performing his function, sits at the middle of the desk and is called the slot man. The copy readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copy readers for appropriate action.

Copy readers usually develop special abilities in addition to their general abilities, and normal operations require a crew of copy readers who possess expertise or experience in specific areas. Some of those specific areas or specialties

at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section; special features, makeup and markets.

The Press-Scimitar normal complement of copy readers is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copy readers is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copy readers possess more than one speciality, in addition to their general ability, none possess all of the specialties; and while some by additional training might acquire additional special skills, experience has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copy readers are not interchangeable with all other readers.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copy reader services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copy reader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copy reader gets an annual vacation of two, three or four

weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copy readers. Sickness takes about another eight weeks. With a normal complement of ten copy readers, including the News Editor, overtime work is required of copy readers from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copy readers. Trial Exhibit 4 is a May, 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copy readers are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copy readers.

At the time plaintiff was being considered for the copy reader position, the Editor of the Press-Scimitar was planning to transfer George Lapides, one of the copy readers, to another position, and he planned to put plaintiff, if employed, into the position to be vacated by Lapides. It was customary for Lapides to work on Saturday.

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copy reader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copy reader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copy readers on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copy reader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copy reader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copy readers, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copy readers are not interchangeable. However, the proof also shows that Saturday work is infrequent for some copy readers and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copy readers with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

The above noted proof addresses itself primarily to the "undue hardship" test which was offered alternatively in the event that the Court does not adopt a finding which supports the defendant's persistent position, namely, that

granting a member of the editorial department of the Memphis Press-Scimitar a regular day off for religious purposes is contrary to the policy of the newspaper which is applied equally to all personnel.[1]

By taking this position the defendant effectively contends that the plaintiff's request to be relieved from Saturday work would be beyond the scope of a "reasonable accommodation" of his religious practices. This Court concludes that the request of the plaintiff to be relieved of Saturday work upon the basis of religious beliefs is within the scope of the "reasonable accommodation" test imposed by Congress and those authorized to promulgate E.E.O.C. regulation 1605.

Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the *Dewey* case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. *Reid* v. *Memphis Publishing Co., supra,* at page 349. In the instant case the defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example in § 1605.1(b) wherein it provides:

> "Such undue hardship for example, may exist where the employee's needed work cannot be performed by

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[1] While there is no proof that any person who observes the Sabbath on Sunday has indicated unwillingness to do so on religious grounds, the customs and practices of the community and the newspaper permit the employees of the Memphis Press-Scimitar to be off on Sunday except in unusual circumstances.

another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concluded that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

This Court has previously found that there was no intentional discrimination on the part of defendant personnel due to plaintiff's religion. Similarly, there is no proof that the executives of the defendant were aware of the obligations imposed upon them by the regulation at the time of the refusal to hire. However, the opinion of the Court of Appeals in this case applied *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971) and quoted therefrom

with regard to the principle that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. 468 F2d at page 350. ". . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co., supra,* at page 432.

It must be remembered that Congress by the Civil Rights Act of 1964 recognized and established new statutory rights of employees in the areas of race, religion and sex. This imposed obligations on employers and, to some extent, employees to change some long standing policies and practices.

The Court having concluded that defendant has not met the test imposed by the law and regulations, the question of damages must now be considered.

Title VII of the Civil Rights Act of 1964 authorized a monetary award intended to restore to recipient his rightful economic status absent the effects of the unlawful discrimination. This award is not punitive. It is equitable in its nature. *Robinson* v. *Lorillard Corp.,* 444 F2d 791, 802 (C.A. 4, 1971).

In the instant case the plaintiff was not hired as of October 1, 1967. At the time he was employed as the editor of a much smaller newspaper, The Tri-State Defender, at a salary of $100.00 per week. On June 30, 1970, the plaintiff terminated his employment with that newspaper and obtained other type employment at a salary which was in excess of what he would be making at the Memphis Press-Scimitar at that time and all times since June 30, 1970.

The proof on damages reflects various factors which effect the amount. Trial exhibits 6 and 7 of the June 1973 hearing are copies of successive collective bargaining agreements which were in effect during the damage period. These set forth minimum weekly salaries of copy readers based

upon length of service with the paper. The agreements also provide for automatic increases at various times during the life of the agreement.

The agreements also provide that pay in excess of the minimum may be established by individual negotiations between the management and the employee. The plaintiff positively testified that the editor of the Press-Scimitar told him that he would start at a salary of $125.00 per week and in ninety days the salary would be increased to $150.00. These amounts were above the then applicable minimums set forth in the contract. The editor testified that he recalled that he considered the plaintiff's prior experience to entitle him to more than the minimum, but he did not recall saying that the plaintiff's salary would be increased to $150.00 per week in ninety days.

Based upon the proof the Court finds that the equitable monetary award to the plaintiff should be computed as follows:

Time Period	Tri-State Defender	Press-Scimitar
Oct. through Dec. 1967 (13 weeks)	$100.00/wk. - $1300.00	$125.00/wk. - $1625.00
Jan. 1, 1968 thru July 6, 1968 (27 weeks)	$100.00/wk. - $2700.00	$150.00/wk. - $4050.00
July 7, 1968 thru Aug. 1, 1969 (55 weeks)	$105.00/wk. - $5757.00	$155.00/wk. - $8525.00
Aug. 1, 1969 thru June 30, 1970 (43 weeks)	$112.00/wk. - $4816.00	$180.00/wk. - $7740.00
Total	$14,591.00	$21,940.00
Difference	$ 7,349.00	

Plaintiff also contends that he should receive an additional award in an amount that the defendant would have paid into the company retirement fund. This Court does not agree with that contention, and therefore denies that sum as part of the plaintiff's award for economic loss.

The only remaining issue concerns the allowance and award of attorney's fees to the plaintiff from the defendant.

In a Title VII case the Court has the statutory discretion to allow the prevailing party a reasonable attorney's fee as part of the costs. 42 USC § 2000e-5(k).

This provision of the law has been construed to mean that attorney's fees should be imposed for two purposes, one to punish defendants for pursuing frivolous arguments, and two in order to encourage individuals to vindicate the strongly expressed congressional policy against discrimination proscribed by the Act. However, in the application of the latter purpose the strong factors are whether the plaintiff has filed a class action and has been awarded injunctive relief. *Robinson* v. *Lorillard Corp., supra,* at page 804. See also *Clark* v. *American Marine Corp.,* 320 F.Supp. 709 (E.D. La. 1974), aff'd. 437 F2d 959 (C.A. 5, 1971).

In the light of all the circumstances shown by the proof in the instant case this Court concludes that its discretion should be exercised by not awarding the plaintiff attorney's fees.

For the reasons set forth above the Clerk is directed to enter a judgment in favor of the plaintiff in the amount of $7,349.00.

Appendix C

Before: EDWARDS and CELEBREZZE, *Circuit Judges*, and THOMAS,* *District Judge.*

EDWARDS, *Circuit Judge.* This appeal presents still another difficult problem concerning the prohibition of religious discrimination contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). Appellant, a Negro newspaper man in Memphis, sought employment as a copyreader on the Press-Scimitar, an afternoon newspaper in Memphis published by defendant-appellee. He filed the instant complaint when he was refused the job. The controlling paragraphs of the complaint appear to be:

> "The plaintiff who at the time of this application and who remains the editor of the Tri-State Defender, applied for a copyreader position with the defendant company. The defendant company denied the plaintiff employment on the basis of his race and on the basis of his religion.
>
> "Plaintiff, a Seventh Day Adventist, does not, because of the tenents of his religion, work on Saturdays although he remains available to work on any other day of the week. The defendant Company declined to employ him, alleging as one ground for its failure to do so their unwillingness to employ an individual who, because of his religion, would not work on a Saturday."

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* Honorable William K. Thomas, United States District Judge for the Northern District of Ohio, sitting by designation.

The case was tried before the United States District Court for the Western District of Tennessee, Western Division. The District Judge entered these findings of fact:

> "In September of 1967, plaintiff indicated to the Press-Scimitar that he was interested in a job as a copyreader, a job that is different from that of a reporter but one still within the editorial department. It is a specialized job which requires a certain amount of experience and training. Plaintiff again took a test, this time a practical test under the supervision of the news editor under whom the copyreaders work. On this test, plaintiff demonstrated to the satisfaction of the news editor his ability to handle the job of copyreader.
>
> "At this time consideration was being given to transferring one of the copyreaders to another department and in this event a job as copyreader would be open. The news editor recommended to the managing editor that plaintiff be given the job. The managing editor added his approval and passed along the application to the editor for final action. In an interview which followed between the editor and plaintiff, the salary terms were discussed and agreed upon the details of plaintiff's prospective employment by defendant were being discussed when the editor learned that plaintiff would not work on Saturdays because of his religious beliefs, he being a member of the Seventh Day Adventist faith. The fact that plaintiff would not work on Saturday was first made known to the defendant during this interview with the editor.
>
> "There is nothing in the proof to indicate that plaintiff's refusal to work on Saturday was anything

other than a conscientious and previously formed religious conviction.

"It was the policy of this newspaper, the Memphis Press-Scimitar, to require all employees to be available for work, if necessary, seven days a week, and certainly to be available for Saturday assignments. And it was further the policy of this newspaper in the assignment of copyreaders to assign new employees to Saturday work; that is, to give preference of other weekdays to employees with more seniority, subject to the specialties possessed by the copyreaders.

"Copyreaders usually have special abilities in addition to their general abilities, and normal operations require a crew of copyreaders who possess expertise in specific areas, such as telegraphic work, Mid-South specialties, and other categories, in addition to the ability to perform the normal routine of copyreading. For this reason, copyreaders are not readily interchangeable with other copyreaders, and a minimum crew made up of a certain number of copyreaders who possess different specialties is required for every day's operation, even for the lighter work day on Saturday. The Press-Scimitar is not published on Sunday, but some reporters do work on Sundays covering various assignments.

"The Press-Simitar has never had a policy whereby any person, white or black, has been hired with the understanding that he would be relieved from working on any particular day. While the record contains some proof to the effect that the Commercial Appeal did have personnel who did not work on certain days for religious reasons, nevertheless these two newspapers are different organizations within the corporate entity named herein as the defendant, and so plaintiff's claim which is based upon his failure to

be employed by the Press-Scimitar must be tested by the separate policy of the Press-Scimitar.

"The court finds as a fact that at the time the plaintiff applied for a copyreader position with the Memphis Press-Scimitar in 1967 both the editor and the managing editor were desirous of hiring black people, and that plaintiff was offered the job of copyreader, and, therefore, the defendant has not been guilty of a refusal to hire plaintiff because of racial discrimination."

The District Judge then entered the following conclusions of law:

"The Civil Rights Act of 1964 is an anti-discrimination act. It is not to be confused with some of the interpretations that have been imposed on school boards as, for example, where such boards have been said to have an affirmative duty to perform.

"In a case of this kind, the burden of proof is on the plaintiff to prove that he was not hired because of discrimination based upon race or religion. Discrimination must be proved by the plaintiff. *Dewey* v. *Reynolds Metals Company* (6th Cir. 1970), 429 F.2d 324, *affirmed by a divided court*, U.S. ——, 39 L.W. 3526 (June 1, 1971).

"There being an established policy on the part of the Memphis Press-Scimitar that all of its employees be available to work on Saturday, and *there being no duty on the part of an employer to accommodate an employee's or potential employee's religious belief contrary to the employer's established and required work schedule,* the court concludes that religious discrimination has not been established by plaintiff's

proof, and concludes, therefore, that the defendant has not been guilty of a violation of the Civil Rights Act of 1964 for a refusal to hire plaintiff because of discrimination based on religion. *Dewey* v. *Reynolds Metals Company, supra.*" (Emphasis added.)

The District Judge's findings of fact are supported by the record and certainly cannot be considered clearly erroneous. We believe, however, that the conclusion of law italicized above is not in accord with the Equal Employment Opportunity Commission's regulations applicable at the time in October of 1967 when Reid was refused the job as copyreader and is not consistent with the latest Supreme Court construction of the Equal Employment Opportunity Act.

We recognize that the District Judge relied upon this court's majority opinion in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971). There were, however, three substantial distinctions between the facts dealt with in *Dewey* and those in the instant case.

1) In *Dewey* the employer had made an accommodation to Dewey's Faith Reformed Church beliefs. Dewey was allowed to secure a qualified replacement when he was assigned to work on Sundays if he had been willing to do so. The majority opinion held that this represented "a reasonable accommodation to the religious needs of its [Reynolds] employees." *Dewey* v. *Reynolds Metals Co.*, *supra* at 331.

2) The E.E.O.C. regulation relied upon by the District Judge in *Dewey* was not in effect at the time of Dewey's discharge but, as we will see was in effect at the time appellant Reid was refused employment.

3) A major basis for the decision in *Dewey* was a final award of the grievance arbitrator under the labor-management contract against Dewey. It may have been the

decisive factor in the Supreme Court's 4-4 affirmance. Of course, no arbitration factor is present here.

By citing these distinctions we do not overlook the fact that the Dewey majority in our court expressed doubts about the constitutional validity of the E.E.O.C. regulation (29 C.F.R. 1605.1 (1970)) which is applicable to the refusal to hire appellant Reid.

29 C.F.R. 1605, adopted July 10, 1967, provides:

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1 OBSERVATION OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the

burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000-12) [32 F.R. 10298, July 13, 1967]

Whatever doubts there may have been about the constitutionality of this regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). While *Duke Power* dealt with racial discrimination and our current concern is with religious discrimination, the Equal Employment Statute treats them similarly. The prohibitions against both forms of discrimination (and the exceptions thereto) are usually contained in the same sentences in the statute. 42 U.S.C. § 2000e-2(a)(1), (a)(2), b, (c)(1), (c)(2), d, h, j (1970).

Justice Burger's discussion of the "business necessity" test laid down in *Duke Power* clearly extended to other prohibited forms of discrimination than race:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Griggs* v. *Duke Power Co.*, *supra* at 431.
>
> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Concerning the "business necessity" test Justice Burger held:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. *Id.* at 431.
>
> The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
>
> The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. *Id.* at 432.

This reasoning convinces us that 29 C.F.R. § 1605.1 (1972) was both effective and valid at the time of appellant Reid's application for the Memphis Press-Scimitar copyreader position.

There is an additional reason for this holding. On March 23, 1972, Congress amended Title VII in several respects. One of those amendments incorporates the sub-

stance of EEOC Regulation 1605.1. This appears in the following definition of religion:

> "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of employer's business." Act of March 24, 1972, Pub.L. No. 92-261, § 701(j), 86 Stat. 103. (42 U.S.C. § 2000e(j).

As shown in *Riley* v. *Bendix Corp.*, —— F.2d —— (5th Cir. 1972) (Decided July 14, 1972), 4 E.P.D. § 7902, legislative history of this amendment stresses that the regulation (29 C.F.R. § 1605.1) did express the prior intention of Congress. This subsequent congressional affirmation strengthens our conclusion about the validity of the regulation.

The question then is not whether the Press-Scimitar's rules were intentionally discriminatory as to religion, but rather whether the Press-Scimitar could make "reasonable accommodation" to the religious practices of appellant Reid "without undue hardship." The answer to these questions should, of course, be first given by the District Court and the case will be remanded for that purpose.

On remand (contrary to the conclusion reached by the District Court on the first hearing) we believe that evidence pertaining to the employment practices of the Memphis Commercial Appeal should be considered as relevant evidence on the question as to whether the Memphis Press-Scimitar could "reasonably accommodate" plaintiff's religious practice "without undue hardship."

We agree with the District Judge that the complaint in this case pertains by its own clear language only to denial of the copyreader job and that therefore the race discrimination practices of the Press-Scimitar before 1967 were not before the District Court and are not before us.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

THOMAS, District Judge, concurring. The record reveals that in September 1967, plaintiff, a Seventh Day Adventist, applied for a position as copyreader on the *Memphis Press-Scimitar*. It is an afternoon newspaper in Memphis published by defendant-appellee; and the appellee also publishes the morning *Commercial Appeal*.

Appellant, editor of the *Tri-State Defender*, a weekly newspaper, demonstrated in a day's trial under the eye of the news editor that he was qualified to perform the duties of a copyreader. The managing editor recommended his employment; and the editor offered him the position. While the salary terms and other conditions were being settled the plaintiff first made known to the editor that because of his religious tenets as a Seventh Day Adventist plaintiff could not and would not work on Saturday. The editor withdrew the offer. However, it was made clear to plaintiff that he could have the job if he agreed to be available for Saturday work.

The trial court found as a fact that

> . . . The *Press-Scimitar* has never had a policy whereby any person, white or black, has been hired with the understanding that he would be relieved from working on any particular day.

The managing editor puts this policy in context when he testified:

> This [plaintiff's refusal to work on Saturday because he was a Seventh Day Adventist] was a little upsetting because we never hire anybody and promise

them any particular day off because of the six day week, and the scheduling, and the emergencies we have we can just not promise anybody any time they will be off a certain day.

Supported by evidence the court made this related finding: It was the policy of the newspaper to require "all employees to be available for work, if necessary, seven days a week, and certainly to be available for Saturday assignments." The court further found that new employees were assigned to Saturday work "to give preference of other week days to employees with more seniority, subject to the specialties possessed by the copyreaders." Cataloging the special abilities and expertise required of copyreaders on this newspaper the trial court found that:

> Copyreaders are not readily interchangeable with other copyreaders, and a minimum crew made up of a certain number of copyreaders who possess different specialties is required for every day's operation, even for the lighter work day on Saturday.

The trial court, relying upon *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), held that: "There . . . [was] no duty on the part of an employer to accommodate an employee's or potentional employee's religious belief contrary to the employer's established and required work schedule," and therefore, plaintiff did not establish a Title VII violation based upon religious discrimination.

In September 1967, when appellant was refused employment as a copyreader because he refused to work on Saturday there was in effect (not so, in *Dewey, supra*) a regulation promulgated by the EEOC under the Equal Employment Opportunity Act. 29 C.F.R. § 1605.1(a)(b)(c)(4), *supra.*

It is likely that the trial court did not apply this regulation to the instant case because of footnote 1 in *Dewey,*

supra, 331 that doubts the authority of EEOC to adopt such a regulation. On March 23, 1972, Congress amended Title VII in several respects. One of those amendments incorporates the substance af EEOC Regulation 1605.1. This appears in the following definition of religion:

> "(j) The term 'religion' includes all aspects of reigious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Act of March 24, 1972, Pub.L. No. 92-261, §701(j) 86 Stat. 103. (42 U.S.C. §2000e(j).)

As shown in *Riley* v. *Bendix Corp.*, —— F.2d —— (5 Cir. 1972), 4 E.P.D. ¶ 7902, legislative history of that amendment stresses that the regulation (29 C.F.R. § 1605.1) did express the will of Congress. This subsequent congressional affirmation clarifies any doubts about the validity of the regulation. Hence, it becomes mandatory that the regulation be applied to the instant case. A similar result was reached in *Riley* v. *Bendix Corp., supra.* I concur, therefore, with the court's opinion that the judgment of the trial court must be reversed and the case remanded with the trial court directed to determine whether the *Press-Scimitar* could make "reasonable accommodation" to the religious practices of appellant "without undue hardship on the conduct of the employer's business."

Since the case is being remanded for action consistent with the Court's opinion, I think it necessary to elaborate on some of the matters expressed in the Court's opinion. The trial court should apply the test of the regulation directly to the policy of the *Press-Scimitar* that requires all employees to be available for work on Saturday and refuses to guarantee a new or old employee a particular day off. In applying the test to this policy and require-

ment of the *Press-Scimitar* the trial court will be governed by *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), and its conclusion that in the Equal Employment Opportunity Act,

> . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The record reveals the existence of a policy and requirement of not guaranteeing any employee a specific day off. To uphold such a policy and requirement the trial court must find that the employer has sustained his burden of demonstrating that such policy and practice is necessitated by the requirements of the employer's business and find further that such policy and practice is applied equally to all employees. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs, supra* 431.

While the trial court found "that there was . . . [no] hostility on the part of defendant because of plaintiff's chosen religion," such finding does not automatically insulate the employer's policy from further challenge. "The act proscribes not only the overt discrimination, but also practices that are fair in form but discriminatory in operation." *Griggs, supra* 431.

This does not mean that all employment practices which happen to adversely affect an employee's or prospective employee's religious observance or practice are proscribed by Title VII. It does mean, and the amendment to Title VII makes it clear, that "unless an employer demonstrates he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," then such practice is prohibited. If the employer shows that a reasonable accommodation

cannot be made and the trial court so finds, then Title VII does not command that the *Memphis Press-Scimitar* abrogate its policy of not guaranteeing its employees a particular day off each week.

There is another dimension of the case that on remand must be considered. The trial court concluded:

> While the record contains some proof to the effect that the *Commercial Appeal* did have personnel who did not work on certain days for religious reasons, nevertheless these two newspapers are different organizations within the corporate entity named herein as a defendant, and so plaintiff's claim which is based upon his failure to be employed by the *Press-Scimitar* must be tested by the separate policy of the *Press-Scimitar*.

The record reveals that the *Press-Scimitar* and the *Commercial Appeal* maintain separate and independent editorial policies. However, both papers are owned by the defendant publishing company, both newspapers are published on the same presses, and both operate in the same building. In addition, the two newspapers follow the policy of not raiding each other's staff. Under these circumstances I believe that the trial court erred in finding that the plaintiff's claim "must be tested by the separate policy of the *Press-Scimitar.*" In determining whether the *Press-Scimitar's* business policy of not guaranteeing a specific day off was necessitated by the requirements of its business the trial court should consider that in its answer,

> Defendant admits that it employs a . . . Seventh Day Adventist or a copyreader who works on schedules that do not include Saturdays and employs a . . . member of the Jewish faith who does not work on Saturdays . . . [because] the *Commercial Appeal* publishes a paper on Sunday and it has been able to

arrange the schedules of said two employees in such a way that the fact that they will not work on Saturdays has not too seriously curtailed its operation.

In light of this admission and any other relevant evidence it should be determined whether the seven day publishing schedule of the *Commercial Appeal* distinguishes the *Appeal's* apparent ability to accommodate to the Saturday off of two of its employees due to their religious observance and practice.

Appendix D

Findings of Fact and Conclusions of Law

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC Section 2,000e, which provides, among other things, for relief against religious and racial discrimination in employment.

Plaintiff, McCann L. Reid, is, and was at all times pertinent to this suit, qualified to serve either as a general assignment reporter or as a copyreader in the editorial department of the Memphis Press-Scimitar, which is one of two metropolitan newspapers owned and published in the Memphis area by the defendant, Memphis Publishing Company.

Defendant permits and encourages the two newspapers to maintain independence with regard to their editorial departments, although this is not true with regard to certain other departments, such as the advertising department, which serve both papers. Both reporting and copyreading are functions of the editorial department, and the employment of personnel to serve in those capacities comes within the responsibilities of the respective editors of the two newspapers, as delegated by them to their subordinate editors. In this case, the managing editor of the Memphis Press-Scimitar had the initial responsibility for determining what employees would be hired, as the need arose, subject to final confirmation by the editor.

The Memphis Press-Scimitar has approximately seventy employees in its editorial department and is, by relative standards, a major newspaper.

As early as 1965, plaintiff sought employment of defendant as a reporter. In that year he was interviewed by

the managing editor of the Press-Scimitar for a job as a reporter. There is conflict in the proof as to whether the job sought was that of beat reporter or general assignment reporter, but in any event there was an application and an interview. At the request of the managing editor, plaintiff took a test and scored high on it; higher than many of the employees who have been hired since that time.

From time to time thereafter, the exact number not being established, plaintiff undertook to inquire about openings and was told on each occasion that there was no opening for the job for which he had applied.

In September of 1967, plaintiff indicated to the Press-Scimitar that he was interested in a job as copyreader, a job that is different from that of reporter but one still within the editorial department. It is a specialized job which requires a certain amount of experience and training. Plaintiff again took a test, this time a practical test under the supervision of the news editor under whom the copyreaders work. On this test, plaintiff demonstrated to the satisfaction of the news editor his ability to handle the job of copyreader.

At this time consideration was being given to transferring one of the copyreaders to another department and in this event a job as copyreader would be open. The news editor recommended to the managing editor that plaintiff be given the job. The managing editor added his approval and passed along the application to the editor for final action. In an interview which followed between the editor and plaintiff, the salary terms were discussed and agreed upon and the details of plaintiff's prospective employment by defendant were being discussed when the editor learned that plaintiff would not work on Saturdays because of his religious beliefs, he being a member of the Seventh Day Adventist faith. The fact that plaintiff

would not work on Saturday was first made known to the defendant during this interview with the editor.

There is nothing in the proof to indicate that plaintiff's refusal to work on Saturday was anything other than a conscientious and previously formed religious conviction.

It was the policy of this newspaper, the Memphis Press-Scimitar, to require all employees to be available for work, if necessary, seven days a week, and certainly to be available for Saturday assignments. And it was further the policy of this newspaper in the assignment of copyreaders to assign new employees to Saturday work; that is, to give preference of other weekdays to employees with more seniority, subject to the specialties possessed by the copyreaders.

Copyreaders usually have special abilities in addition to their general abilities, and normal operations require a crew of copyreaders who possess expertise in specific areas, such as telegraphic work, Mid-South specialties, and other categories, in addition to the ability to perform the normal routine of copyreading. For this reason, copyreaders are not readily interchangeable with other copyreaders, and a minimum crew made up of a certain number of copyreaders who possess different specialties is required for every day's operation, even for the lighter work day on Saturday. The Press-Scimitar is not published on Sunday, but some reporters do work on Sundays covering various assignments.

The Press-Scimitar has never had a policy whereby any person, white or black, has been hired with the understanding that he would be relieved from working on any particular day. While the record contains some proof to the effect that the Commercial Appeal did have personnel who did not work on certain days for religious reasons, nevertheless these two newspapers are different organizations within the corporate entity named herein as the

defendant, and so plaintiff's claim which is based upon his failure to be employed by the Press-Scimitar must be tested by the separate policy of the Press-Scimitar.

The courts finds as a fact that at the time the plaintiff applied for a copyreader position with the Memphis Press-Scimitar in 1967 both the editor and the managing editor were desirous of hiring black people, and that plaintiff was offered the job of copyreader, and, therefore, the defendant has not been guilty of a refusal to hire plaintiff because of racial discrimination.

We come now to the conclusions of law which must be applied to the facts hereinabove recited.

The Civil Rights Act of 1964 is an anti-discrimination act. It is not to be confused with some of the interpretations that have been imposed on school boards as, for example, where such boards have been said to have an affirmative duty to perform.

In a case of this kind, the burden of proof is on the plaintiff to prove that he was not hired because of discrimination based upon race or religion. Discrimination must be proved by the plaintiff. Dewey vs. Reynolds Metals Company, (6th Cir. 1970) 429 F.2d 324, affirmed by a divided court, —— U.S. ——, 39 L.W. 3526 (June 1, 1971).

There being an established policy on the part of the Memphis Press-Scimitar that all of its employees be available to work on Saturday, and there being no duty on the part of an employer to accommodate an employee's or potential employee's religious belief contrary to the employer's established and required work schedule, the court concludes that religious discrimination has not been established by the plaintiff's proof, and concludes, therefore, that the defendant has not been guilty of a violation of the Civil Rights Act of 1964 for a refusal to hire plaintiff

because of discrimination based on religion. Dewey vs. Reynolds Metals Company, supra.

There is no proof that there was any hostility on the part of defendant because of plaintiff's chosen religion. There is no proof that the editor, or managing editor of the Press-Scimitar or any other employee of the defendant in a managerial capacity held any personal animosity toward Seventh Day Adventists. The problem arose merely because plaintiff's religious belief required a change of policy and practice on the part of the Press-Scimitar that it was not willing to make, and was not required to make in order to comply with the Civil Rights Act. Or, to state it another way, the failure of the defendant to accommodate plaintiff's religious belief was not discrimination against plaintiff because of his religion.

Therefore, the court concludes that the plaintiff has not established discrimination on the part of the defendant on the basis either of race or of religion.

In arriving at this conclusion, the court has not been unmindful of the fact that proof of racial discrimination at a prior time may be considered in connection with a charge of racial discrimination at a subsequent time. In fact, the court believes that there is evidence that racial discrimination existed prior to the time that the plaintiff was offered this job. However, the court does not believe that this entitles the plaintiff to a judgment for any damages, nor does it require an injunction as sought by the complaint, the court being of opinion, and so finding, that any such policy of racial discrimination was corrected at the time this job was tendered to the plaintiff, if not before.

While the fact is not controlling here, it will not be amiss to comment upon a practice followed by the Press-Scimitar which may have led to a misunderstanding in this case. At the time of plaintiff's application in 1965, he was told by the managing editor to go to the personnel department

and to take a test. He was then advised that no job was available but that he would be contacted if anything developed. The proof shows that the test was a meaningless gesture in that the editorial department customarily relies upon factors other than such tests in making its selection of employees. In view of the fact that white reporters were hired in July of 1966 and in February of 1967, the conclusion appears inescapable that plaintiff, from his standpoint, would think that the Press-Scimitar would not hire him because he was black.

The court is of opinion that the Civil Rights Act contemplates a more definite system to assure black people that they are not being discriminated against. However, the court finds no basis for assessing damages for any discrimination which the defendant, acting through the Memphis Press-Scimitar, may have been guilty of prior to September of 1967. This suit is not based on any acts of the defendant committed prior to September of 1967. The pleadings do not join issue on any failure of defendant to hire plaintiff as a reporter during the period of time between 1965 and 1967. The complaint charges the defendant with failure to hire him as a copyreader, which the proof places in September of 1967, and the court has already determined that the proof does not establish any racial or religious discrimination on the part of the defendant arising out of the failure of the Memphis Press-Scimitar to accommodate plaintiff's religious belief by hiring him with a guarantee that he would never have to work on Saturday.